

Gina Harrison
Director
Federal Regulatory Relations

1275 Pennsylvania Avenue, N.W., Suite 400
Washington, D.C. 20004
(202) 383-6423

PACIFIC  **TELESIS**
Group-Washington

October 28, 1996

RECEIVED

OCT 28 1996

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, NW, Room 222
Washington, DC 20554

DOCKET FILE COPY ORIGINAL

Dear Mr. Caton:

Re: *IB Docket No. 95-59, Preemption of Local Zoning Regulation of Satellite Earth Stations; CS Docket No. 96-83, Restrictions on Over-the-Air Reception Devices: Television Broadcast Service and Multichannel Multipoint Distribution Service*

On behalf of Pacific Telesis Group, please find enclosed an original and six copies of its "Reply Comments" in the above proceeding.

Please stamp and return the provided copy to confirm your receipt. Please contact me should you have any questions or require additional information concerning this matter.

Sincerely,

Gina Harrison / AFC

Enclosure

No. of Copies rec'd 025
LISTA B C D E

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

RECEIVED

OCT 28 1996

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of

Preemption of Local Zoning Regulation of Satellite
Earth Stations

IB Docket No. 95-59

In the Matter of

Implementation of Section 207 of the
Telecommunications Act of 1996

CS Docket No. 96-83

Restrictions on Over-the-Air Reception Devices:
Television Broadcast Service and Multichannel
Multipoint Distribution Service

DOCKET FILE COPY ORIGINAL

**REPLY COMMENTS OF PACIFIC TELESIS GROUP
ON FURTHER NOTICE OF PROPOSED RULEMAKING**

I. INTRODUCTION AND SUMMARY

Pacific Telesis Group ("Pacific") hereby submits reply comments on the Commission's Further Notice of Proposed Rulemaking ("FNPRM").¹

Pacific advocates that the Commission:

¹ In the Matter of Preemption of Local Zoning Regulation of Satellite Earth Stations, IB Docket No. 95-59; In the Matter of Implementation of Section 207 of the Telecommunications Act of 1996, Restrictions on Over-the-Air Reception Devices: Television Broadcast Service and Multichannel Multipoint Distribution Service, CS Docket No. 96-83, Report and Order, Memorandum Opinion and Order, and Further Notice of Proposed Rulemaking, FCC No. 96-328 (rel. August 6, 1996) ("Report and Order and FNPRM").

- ensure that it is giving choices in the video market to the 35% of the viewing population that does not own its housing, and in so doing, refrain from creating an information poor sector of society,
- construe Section 207 according to its plain meaning by extending the section's protections to all "viewers," and not excluding commercial property from the section's scope,
- reject the common antenna as a substitute for real video choice, and
- find that allowing non-owners the right to install over-the-air antennas does not effect a taking under the Fifth Amendment.

II. THE COMMISSION SHOULD PROMULGATE RULES THAT ALLOW RENTERS AND OTHER MDU DWELLERS -- 35% OF THE HOUSING MARKET -- CHOICE IN VIDEO PROVIDERS

As Cellular Vision USA aptly points out, renters and other multiple dwelling unit ("MDU") occupants are 35% of the housing market. Cellular Vision USA's Comments, at 5-6. Unless the Commission allows these residents some latitude in placing devices so as to receive the video programming of their choice, it will exclude a huge sector of the population from new aspects of the Information Age. In so doing, it will contribute significantly to the development of information-rich and information-poor factions of the economy, much to the detriment of the public as well as to new video providers.

Instead of paving the way for this division of society into haves and have nots, the Commission should promulgate simple rules which allow tenants and other non-owners latitude to place small antennas of their choice. Congress gives the Commission no choice but to do so. As several commenters have noted, Section 207 does not only create rights for "property owners." Rather,

it prohibits restrictions which prohibit the rights of “viewers.” Telecommunications Act of 1996, Pub. L. 104-104, 111 Stat. 56 (1996) § 207 (“1996 Act”) (emphasis added). See Comments of Consumer Federation of America, et al., at 2-3; Comments of DirecTV, at 14-15.

To construe the term “viewers” to exclude 35% of the population -- and a much higher percentage of the working poor and poor members of the population -- makes no sense. Such a construction also conflicts with the Congress’ desire to promote competition in video markets. See, e.g., 47 U.S.C. Section 543(a)(2) (re cable rate regulation, headed “Preference for Competition”); 47 U.S.C. Section 548 (“Development of Competition and Diversity in Video Programming Distribution”).

Nor is Section 207 reasonably construed to exempt commercial income-producing property from its scope, as the National Apartment Association claims. Comments of National Apartment Ass’n et al., at 21 et seq. Section 207 contains no reference limiting its scope to certain types of buildings, and the suggestion that it be so limited is thus without basis and also designed to cut off a large segment of the viewing public from the right to choose its video provider.

Because new video providers cannot reach viewers with their programming unless necessary infrastructure -- e.g., antennas and inside wiring -- is installed, the dream of competition cannot become a reality without rules that allow providers access to end users.

III. COMMON ANTENNAS ARE NOT THE SOLUTION

We have no problem with rules that allow property owners to install common antennas and tenants to make use of them, but common antennas should not be used as a means to deprive tenants of other video options. E.g., Community Ass’ns Inst., et al., at 32 et seq. Indeed, common antennas often cannot deliver video signal adequate to serve all tenants in a complex, so more than one common antenna would be required. For example, in garden-style complexes consisting of several

low-rise buildings, an antenna may need to be placed on each building to avoid expensive trenching between buildings. Thus, it may be less burdensome on landlords to allow renters to install antennas of their choice rather than requiring landlords to install several common antennas in order to bring over-the-air video signals to all residents of a single building.

Moreover, the Commission has already ruled that individual property owners may install their own antennas on property they own in an MDU.² Thus, the Community Associations Institute's plea to substitute such a right with a common antenna requirement is belated and beyond the scope of this rulemaking.

IV. THERE IS NO "TAKINGS" PROBLEM POSED BY A RULE ALLOWING PLACEMENT OF ANTENNAS ON COMMON PROPERTY

We briefed certain takings issues in our opening comments and will not repeat those remarks here. There are some additional reasons why rules allowing parties to install antennas on common property should not be construed as a taking.

A. Allowing Temporary Premises Access is Not a Taking

First, contrary to the Community Associations Institute's claim (at 14 et seq. and 27 et seq.), to the extent building owners complain about allowing tenants and workmen access to their property to install the antennas, this temporary access is not a taking. The Court in Loretto did not prohibit temporary physical "occupations," only permanent ones. See Loretto v. Teleprompter Manhattan CATV Corp. 458 U.S. 419 (1982). The Court distinguished situations in which the occupation was only temporary (and in which no taking was found) -- e.g., Kaiser Aetna v. United

² Report and Order and FNPRM, ¶ 52 ("In addition to covering restrictions on antenna placement on property owned by the viewer, our rule will also apply where an individual who has a direct or indirect ownership interest in the property seeks to install an antenna in an area that is within his or her exclusive use or control.").

States, 444 U.S. 164 (1979) and PruneYard Shopping Center v. Robins, 447 U.S. 74 (1980). The Court's more recent decision in First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304 (1987) that "temporary" takings are compensable is distinguishable, because such takings must "deny a property owner all use of the property" in order to be actionable. Thus the temporary occupation effected by having installers on the premises is not actionable.

B. Tenants Have A Common Law Right to Install Antennas

Second, contrary to the Community Associations' Institute's claim (at 8 et seq.), to the extent allowing access to MDU owners' property facilitates a tenant or other non-owning resident's access to video competitors, the building owners may have some common law obligation to allow this access for the benefit of their tenants. Such a right would be akin to the implied warranty of habitability that accompanies any tenancy. There is support for affording tenants such rights in the Second Restatement of Property, which gives a tenant the right to "make changes in the physical condition of the leased property which are reasonably necessary in order for the tenant to use the leased property in a manner that is reasonable under all the circumstances." Restatement (Second) of Property, § 12.2(1) (1977).

As the Consumer Federation of America argued in its opening comments,³ the Court in Loretto did not rule out regulations which require landlords to provide certain amenities to their tenants. The Court observed that "[i]f [the statute at issue] required landlords to provide cable installation if a tenant so desires, the statute might present a different question from the question before us, since the landlord would own the installation." For example, the Court acknowledged that

³ Comments of Consumer Federation of America, et al., at 10-13. See also Comments of the National Association of Broadcasters, at 9-12 (distinguishing the Loretto case).

landlords must provide mailboxes, or allow tenants to install them: “[O]ur holding today in no way alters the analysis governing the State’s power to require landlords to comply with building codes and provide utility connections, mailboxes, smoke detectors, fire extinguishers, and the link in the common area of a building.” (Emphasis added.)

Mailboxes are not safety devices, but rather facilitate a tenant’s communication with the outside world. Giving a tenant access to alternative video providers serves the same purpose. Thus, a regulation requiring that landlords give alternative providers access in order to accommodate tenants may be just the sort of reasonable regulation of the terms of a tenancy that the Court in Loretto declined to foreclose. See also FCC v. Florida Power Corp., 480 U.S. 245, 252 (1987) (“statutes regulating economic relations of landlords and tenants are not per se takings”); Connolly, 475 U.S. at 223-24 (“Contracts, however express, cannot fetter the constitutional authority of congress. . . . Parties cannot remove their transactions from the reach of dominant constitutional power by making contracts about them.”).

C. Limiting Tenants’ Rights to Install Antennas Impairs Their First Amendment Rights

Finally, as the Consumer Federation of America points out in its comments, a decision impairing tenants’ ability to receive the programming of their choice will directly impact the First Amendment rights of views to have access to a multiplicity of sources of news and other information. See Turner Broadcasting System, Inc. v. FCC, __ U.S. __, 114 S. Ct. 2445, 2470 (1994) (“Assuring that the public has access to a multiplicity of information sources is a governmental purpose of the highest order, for it promotes values central to the First Amendment.”); Red Lion Broadcasting Co., Inc. v. FCC, 395 U.S. 376, 390 (1969) (“It is the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences”) (emphasis added).

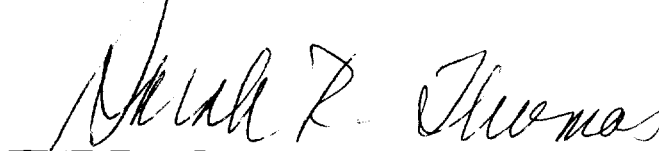
The Commission should reject the takings arguments and allow tenants and other non-owning residents the right to install small antennas in common areas.

V. CONCLUSION

We urge the Commission to give the large population of renters and MDU dwellers choice among video providers, properly construe Section 207 to apply to all "viewers," not just owners, reject attempts to have common antennas substitute for real choice, and rule that such choice does not constitute a taking.

Respectfully submitted,

PACIFIC TELESIS GROUP

A handwritten signature in dark ink, appearing to read "Sarah R. Thomas", is written over a horizontal line.

LUCILLE M. MATES
SARAH R. THOMAS

140 New Montgomery Street
Room 1522A
San Francisco, California 94105
(415) 542-7649

MARGARET E. GARBER

1275 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
(202) 383-6472

Its Attorneys

Date: October 28, 1996